Supreme Court, U.S.
FILED
MAR 13 1992
OFFICE OF THE CLERK

No. 91-1196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

T. L. HEGGY,

Petitioner,

v.

CATHERINE A. HEGGY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Ms. Heggy's Brief in Opposition (hereinafter "Op. _") vividly describes the confusion in the courts below over whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521, applies to interspousal wiretapping; it demonstrates the same ahistorical misunderstanding of how Title III should be interpreted that led the court below astray; and it

confirms that this Court should grant *certiorari* in this case.

1. Ms. Heggy concedes that circuit courts and even state and federal courts within circuits have reached different results on the question presented in this case. Op. 6-7, 11. She attempts to distinguish the circuit decisions which have found that Congress did not intend Title III to sweep everyone within its scope[1] by speculating about how those courts would have decided this case. Op. 7. However, Ms. Heggy proves little by demonstrating that the only consistency among the circuits is that they are driven by the facts of each case, without any guiding legal standard. That is conflict, not consistency.[2]

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[1]*Simpson v. Simpson*, 490 F. 2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974); *Anonymous v. Anonymous*, 558 F. 2d 677 (2d Cir. 1977).

[2]Ms. Heggy does not even attempt to explain the conflict between the Alabama supreme court's decision in *Ex Parte O'Daniel*, 515 So. 2d 1250 (Ala. 1987), which "concluded that Title III prohibited spousal wiretapping . . ." (Op. 11), and the Fifth Circuit's *Simpson* decision, which found that it does not. *Simpson*, 490 F.2d at 805. The *Simpson* decision binds the Eleventh Circuit, which includes the state of Alabama. *See Bonner v. City of Pritchard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981). Thus, in Alabama, there is a federal cause of action for interspousal wiretapping in *state* court, but not in *federal* court. Ms. Heggy attempts to discount the conflict between the Fourth Circuit and the South Carolina supreme court (*Cf. Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984) (Title III applies to wiretaps between spouses who are living together at the time of the wiretap) and *Baumrind v. Ewing*, 279 S.E.2d 359 (S.C.), *cert. denied*, 454 U.S. 1092 (1981) (Title III does not apply to such wiretaps)) on the ground that the state supreme court decision preceded the circuit court decision (Op. 11). That fact, however, is irrelevant: in South

(continued on next page...)

The practical significance of this conflict is shown in the bewildering range of circumstances and considerations reflected in the domestic wiretap cases discussed in the petition and opposition.[3] This Court should not allow civil (and ultimately criminal) liability under Title III to rest on how much intrusion into domestic affairs and domestic relations law a particular court or prosecutor wants to sanction on a given day. *Cf. H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring in the judgment) (noting that federal racketeering statute, "since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws"); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966) (invalidating law that "le[ft] the public uncertain as to the conduct it prohibits [and] le[ft] judges and jurors free to decide, without any legally fixed standards, what

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[2](...continued from previous page)
Carolina, in *federal* court there is a federal cause of action for wiretapping by a spouse of the family phone, but not in *state* court.

[3]*See, e.g., Newcomb v. Ingle*, 944 F.2d 1534, 1535 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 903 (1992) (stating without explanation that wiretapping of family phone by parent and grandparent is "qualitatively different" from interspousal wiretaps); *United States v. Jones*, 542 F.2d 661, 673 (6th Cir. 1976) (distinguishing *Simpson* on ground that spouses had separated, surveillance was conducted from outside the home, and husband had no right to be on the premises); *Rickenbaker v. Rickenbaker*, 226 S.E.2d 347, 352 (N.C. 1976) (distinguishing *Simpson* on ground that husband and wife were no longer living together); *Remington v. Remington*, 393 F. Supp. 898, 901 (E.D. Pa. 1975) (distinguishing *Simpson* on ground that, *inter alia*, wife had involved private detective); *Gill v. Willer*, 482 F. Supp. 776, 778 (W.D.N.Y. 1980) (distinguishing *Anonymous* on ground that a third party was suing and that the tapes were played before other persons).

is prohibited and what is not in each particular case"). Absent direction from this Court, however, the decision below, combined with the conflict within and among the circuits (and even within the Tenth Circuit itself),[4] will leave courts below, and persons potentially subject to Title III, in hopeless confusion over the scope of the statute. *See* Pet. 19-20.

2. The issue here is whether Title III should be construed to apply to interspousal wiretaps. If interpreted that way, Title III was when enacted a sweeping federal intrusion into state domestic relations law (*see* Pet. 21-22 & n.21) and remains so today. To avoid this incongruous result, the court below should have examined Title III in light of the animating legal assumptions at the time of passage,[5] with a presumption that Congress did not intend to encroach upon the realm of domestic relations traditionally reserved to the states. Pet. 16.

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[4]*See* Petition for Certiorari (hereinafter "Pet. __") at 16 (noting the Tenth Circuit's determination in *Newcomb* that Title III did not allow a cause of action by an individual against his parent and grandparent).

[5]Ms. Heggy's speculations about what Congress may have intended when it revised Title III in 1986 (Op. 21 & n.38) are completely irrelevant. Ms. Heggy does not suggest that Congress was asked to clarify the status of interspousal wiretaps (*cf., e.g., T.I.M.E. Inc. v. United States*, 359 U.S. 464, 478 (1959)), but even if that had been requested, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). "'It is the intent of the Congress that enacted [the section] . . . that controls.'" *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979), quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977).

An historical, commonsense reading of Title III makes it plain that Congress did not intend the statute to intrude so far: the implication would be that Congress intended to interfere with the comprehensive statutory schemes which states had developed to govern domestic relations issues -- especially those governing divorce.[6] Furthermore, Congress would be deemed to have provided spouses federal causes of action against their spouses at a time when most states still barred interspousal tort actions. Pet. 18-19.

Even more telling, Ms. Heggy's interpretation would posit a Congressional intent, in 1968, to criminalize wiretapping by family members of family conversations on the home telephone. Pet. 19-20. Ms. Heggy seems to espouse this controversial interpretation (Op. 19-20), but she cannot find support for the contention that federal law enforcement authorities since Title III's enactment have demonstrated any stomach for enforcing the statute

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[6]Whether or not Title III encroaches upon any specific current *Oklahoma* law is irrelevant to the construction of the statute. *Cf.* Op. 16. The actual degree of intrusion, however, illustrates the burden which Ms. Heggy's interpretation must carry. Ms. Heggy does not contest the fact that Oklahoma vests its divorce courts with great discretion to determine the division of property between spouses (Pet. 18 n.16); that she was dissatisfied with the low property settlement she had received in the divorce proceeding that was still pending appeal when she filed this suit (Pet. 5, 18); and that as a result of this federal suit, she would be entitled to $215,000 more than the divorce court was willing to award her (Pet. 6). By construing Title III to provide a federal remedy in this case, the Tenth Circuit has ineluctably interfered with the Oklahoma courts' determination of how the Heggys' property should be divided upon dissolution of their marriage.

against family members for tapping the family telephone.[7]

Against this backdrop of legal and ethical assumptions, Ms. Heggy's assertion that there was a "literal[] deluge[]" of legislative indications that Title III provides a federal remedy for interspousal wiretaps (Op.

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[7]Instead, Ms. Heggy cites two federal cases whose facts work *against* that proposition. In *United States v. Rizzo*, 583 F.2d 907 (7th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979), the prosecution indicted a private investigator, but apparently did *not* indict the spouses who worked with him in tapping lines. The other federal case cited by Ms. Heggy, *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976), did not involve the tapping of the family phone by a spouse while the parties were still living together, but rather the interception of an estranged wife's conversations after the wife "had left the marital home and established her own, separate residence." *Anonymous*, 558 F.2d at 679. Ms. Heggy's citations to state cases applying state wiretap laws are similarly unavailing -- indeed, they do not even bear on whether wiretapping of the kind that occurred here should be criminal. In *Kendrick v. State*, 182 S.E.2d 525 (Ga. App. 1971), as in *Rizzo*, the state prosecuted a private detective and a person he enlisted to help him tap a family telephone, but did not indict the wife who had employed the detective and participated in the tapping. In *State v. Jock*, 404 A.2d 518 (Del. Super 1979), the parties were estranged at the time the husband tapped the phone. *Id.* at 519. In *Kent v. State*, 809 S.W.2d 664 (Tex. App. -- Amarillo 1991), the state was not prosecuting the appellant for wiretapping, but rather determining whether his probation should be revoked. The court there noted that the case could not be controlled by *Simpson* in part because the husband had had a tap placed on his telephone which tied it into a different phone in a building a half mile away. *Id.* at 667. *People v. Snowdy*, 47 Cal. Rptr. 83 (Cal. Dist. Ct. App. 1965), was decided three years *before* Title III was passed, and turned on the fact that under California's wiretap statute, the subscriber needed consent of the *telephone company* in order to avoid a criminal violation of the statute. *Id.* at 86.

19 n.32) rings hollow. *Cf. Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974) ("[w]hen we narrow our search to material relevant to this ultimate issue, that of whether Congress intended its regulations to invade the realm of personal acts within the marital home, we find very little indeed").

3. Ms. Heggy's attempt at the door of this Court to recharacterize this as a case about misuse of law enforcement power simply must fail. First, there is no merit to Ms. Heggy's contention that there is precedent in this Court for raising a previously undeveloped factual and legal issue in the opposition to a petition for *certiorari*.[8] Nor is it surprising that there is no support for so fundamentally unfair a proposition. From the start, this suit has been about whether a husband who taped his wife's telephone conversations on the family phone could be held civilly liable under Title III. The court below treated this case as an interspousal wiretap case (Pet. App. 11a-19a), as did the district court (*id.* at 28a-32a). Mr. Heggy was sued in his private capacity, not in any official capacity. Ms. Heggy actually used this fact in her

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[8]Ms. Heggy suggests that the decision below may be affirmed on an alternative theory neither briefed nor argued before the lower courts. This bears no resemblance to a situation in which this Court affirms a lower court decision on narrower, yet properly briefed, grounds. *Cf. Bowen v. American Hospital Ass'n*, 476 U.S. 610 (1986) (affirming invalidation of federal regulation on narrower ground briefed by parties). Nor does Ms. Heggy's contention resemble this Court's affirmance of a lower court decision based on questions appropriately considered below but not raised in a petition for *certiorari*. *Cf. United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977) (affirming district court judgment and addressing issues raised in the lower courts and argued before the Supreme Court, but not mentioned in the petition for *certiorari*).

district court trial brief to argue that Mr. Heggy could not assert a good faith defense:

> Mr. Heggy in this matter is not sued in his official capacity as director of the Bureau of Narcotics, but is instead sued as an individual. . . . [T]he good faith defense in an action for unlawful interception of telephone communications is available only to law enforcement personnel and others who may be expected to assist in implementing authorized interceptions expressly contemplated under Title 18. Persons not engaged in law enforcement, having no statutory means to secure official authorization of interceptions they wish to make, will never be in a position to invoke such a defense. Thus it is submitted that Mr. Heggy has no defense whatsoever available to him in this matter . . . ."

Trial Brief of Plaintiff, Catherine A. Heggy at 3, *Heggy v. Heggy*, No. CIV-88-1185-R (W.D. Okla. July 3, 1989). There was never any suggestion that his former wife might one day change her mind and allege that Mr. Heggy may be liable under the wiretap statute for having allegedly abused his law enforcement authority in tapping his phone. Nor has Mr. Heggy been given an opportunity to defend himself in the record against such a charge.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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